***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-5007
75-5008

To be Argued By
ARTHUR S. OLICK

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, AFL-CIO,

Appellant,

v.

REA EXPRESS, INC., Debtor
REA EXPRESS, INC., Debtor in Possession,

Appellee.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Appellant,

v.

REA EXPRESS, INC., Debtor
REA EXPRESS, INC., Debtor in Possession,

Appellee,

On Appeal From the United States District Court
For the Southern District of New York

# APPELLEE'S BRIEF

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permitted no differentiation in the treatment of executory

distinction between types of executory

UNITED STATES COURT OF APPEALS

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No.75-5007

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# APPELLEE'S BRIEF

## Preliminary Statement

REA Express, Inc. ("REA"), a debtor in possession, in a bankruptcy proceeding under Chapter XI of the Bankruptcy Act, appealed to the United States District Court for the Southern District of New York from an order of the Bankruptcy Court (Galgay,

J.) denying its application pursuant to Section 313(1) of the Bankruptcy Act [11 U.S.C.§713(1) ] to reject two collective bargaining agreements. The District Court (Wyatt; J.) reversed and the two affected unions appeal to this Court. Their motion for a stay pending appeal was denied on May 27, 1975.

The collective bargaining agreements rejected by REA were with the Brotherhood of Railway Airline & Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO ("BRAC") and the International Association of Machinists & Aerospace Workers ("IAM"), the labor unions representing REA's non-supervisory employees. Each union has appealed and the appeals have been consolidated.

follows:

## Statement of the Case

On February 18, 1975, REA and several of its affiliated companies filed petitions pursuant to the provisions of Chapter XI, Section 322, of the Bankruptcy Act [11 U.S.C.§§205 et seq.]. By order dated February 18, 1975, REA was continued in the possession and operation of its business. Thereafter, on March 24, 1975, REA moved in the Bankruptcy Court pursuant to Section 313(1) of the Bankruptcy Act and Rule 11-53 of the Rules of Bankruptcy Procedure to reject its collective bargaining agreements with BRAC and IAM as onerous and burdensome [Tr. 4/1/75, pp. 2,3].* At the same time, BRAC and IAM moved to compel REA to comply with those agreements and to restore certain deferred wage payments owed to BRAC and IAM members [Tr. 4/1/75, pp. 2,5]. Judge Galgay on May 2, 1975, denied both motions and REA appealed to the District Court pursuant to Section 67(c) of the Bankruptcy Act.

Judge Galgay found that "both Labor Agreements herein are executory within the meaning of Section 313(1)." [Opinion, p.11].** He "assum(ed) without deciding that this Court has the power to reject a collective bargaining agreement." [Opinion, p.11]. He determined, however, that despite the facts found by him which establish that the contracts are onerous and burdensome to REA they were not "onerous and burdensome" within the meaning of the applicable statute.

A reading of the decision of Bankruptcy Judge Galgay establishes that he recognized the validity of REA's assertions that

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* References are to the transcript of the hearing before Bankruptcy Judge Galgay held on April 1 and 3, 1975.

** A copy of Bankruptcy Judge Galgay's opinion is annexed to BRAC's Brief as Appendix "B".

it cannot effect proposed consolidations under the existing collective bargaining agreements by reason of the delays inherent in following the procedures thereby required, and that, by reason of the costs to REA mandated by such agreement, REA cannot meet its contractual wage and fringe benefit obligations, and its obligations to suppliers and other creditors as debtor in possession. Nevertheless, he refused to apply Section 313(1) of the Bankruptcy Act on the ground that he did not think Congress intended to include collective bargaining agreements within its purview.

Judge Wyatt in the District Court disagreed.* He found that there was nothing in the legislative history of the Bankruptcy Act to support the proposition that collective bargaining agreements were not within the purview of Section 313(1) [Opinion p.2]. Citing 8 Collier on Bankruptcy 199 (14th ed.) he noted that:

> "There is no restriction on the type of executory contract that may be rejected." (footnote omitted)

On the basis of the Bankruptcy Judge's findings of fact, the District Court held that the subject collective bargaining agreements were "onerous and burdensome" and, therefore could be rejected under Section 313(1) [Opinion, pp. 1,3]. The District Court also found no conflict between Section 313(1) of the Bankruptcy Act and the Railway Labor Act [Opinion p.3].

*A copy of Judge Wyatt's opinion is annexed to BRAC's Brief as Appendix "A".

## Statement of Facts

REA is a Delaware corporation with its office and principal place of business in New York City. It provides surface and air express service to customers throughout the United States. Surface express operations are regulated by the Interstate Commerce Commssion and various State regulatory agencies; the air express operations are regulated by the Civil Aeronautics Board. At the time it filed for reorganization REA had approximately 300 terminals in all fifty States and Puerto Rico; it employed 7,624 persons not counting some 14,000 employees who were then on furlough [Exh.7C].* Since 1969 the surface express operations have been transformed from a primarily railroad-oriented operation to a basically trucking-oriented operation. The surface express operations represent a unique type of transportation service not provided by trucking or railroad freight companies. The operations of REA are unique, first in the lack of consolidation, that is, REA is a small parcel delivery service and, secondly, in that REA serves many small localities not served by other types of transportation.

REA is the only air express company in the United States. As such, it provides a portal to portal parcel delivery service by air, a service which is unparalleled by any other company (the only alternative is air freight forwarders who consolidate their shipments and the airlines' own freight shipment operations). As the only air express company, REA provides a unique and otherwise unavailable service to shippers of small packages, shippers of unusual types of cargos and shippers from the non-major airport areas.

* References preceded by "Tr." are to the pages of the hearing transcripts and references preceded by "Exh." are to the exhibits received in evidence at the hearing before Bankruptcy Judge Galgay held on April 1 and 3, 1975.

REA was party to two major collective bargaining agreements with the two major unions representing the vast majority of its employees [Exhs. 8A, 8B, 9A, 9B]. It was party to a collective bargaining agreement with BRAC covering all REA employees except (a) machinists, blacksmiths, woodworkers, printers, trimmers, carpenters, stationary engineers and similar craftsmen represented by IAM, (b) part-time employees performing a particular service, (c) emergency service employees and (d) specified executive and managerial personnel. The collective bargaining agreement between REA and BRAC, by its terms, ran until December 31, 1975. REA was also party to a collective bargaining agreement with IAM which, by its terms, was to continue until June 1, 1976. Each agreement prescribed the terms and conditions of employment for covered employees including (a) wage rates, (b) overtime, holiday and vacation pay, (c) fringe benefits, and (d) unemployment benefits. Moreover, each agreement purported to restrict REA's right to close or discontinue facilities, transfer and lay off workers, consolidate operations or otherwise to effect economies essential to the continued viability of the business.

Bankruptcy Judge Galgay found the material facts virtually undisputed. They may be summarized as follows:

As of March 28, 1975, REA had incurred liabilities as debtor in possession of $3,317,000 [Tr. 4/1/75, p.30]. In addition, it had an outstanding payroll liability of $4,050,000 and a liability for "CODs" collected on behalf of its customers of $1,871,000 [Exh.1]. As of that date, REA was collateralizing outstanding irrevocable letters of credit issued by First Pennsylvania Bank, N.A with cash at the rate of $75,000 per week and was paying

the Internal Revenue Service on account of a secured indebtedness for prefiling railroad retirement taxes, $25,000 per week. [Tr. 4/1/75, p. 10; Exh. 1].

For the weekly pay periods commencing February 24, 1975, to the present, REA's management, in a collective decision, deferred payment of 10% of its Union payroll, a deferral which remains a liability of REA and amounts to some $150,000 per week [Tr. 4/1/75, pp.11-14, 41-44, 110; Tr. 4/3/75, pp.36-8; Exh. 10; Tr. 4/1/75, p.13]. In addition, REA has been unable to pay its Union employees some $250,000 due them as holiday pay for George Washington's Birthday, again a liability of the debtor in possession [Tr. 4/1/75, p.14]. For each of the four weeks commencing March 31, 1975, REA required approximately $3,500,000 to meets its current obligations assuming a continuation of the 10% deferral in Union wages and the level of payments to the First Pennsylvania Bank,N.A. and the Internal Revenue Service [Exh. 2, Tr. 4/1/75, pp. 15-21]. REA has been paying $100,000 weekly to First Pennsylvania Bank, N.A., and $30,000 weekly to the Internal Revenue Service. Revenues were projected at some $3,500,000 per week over this period prior to the increase in payments as described above; the result was that REA's cash balance as of April 25, 1975, was lower than the then estimated $547,000 [Exh. 2, Tr. 4/1/75, pp. 21-2]. These projections did not take into account payment of the $3,317,000 in debtor in possession liabilities which had been incurred at the time the proceeding was heard [Exhs. 1,2, Tr. 4/1/75, pp. 21-2]. Even with the continuation of the 90% Union payroll, and its reduced payroll to all other employees, REA could not continue to operate, i.e., survive, without generating more cash and substantially reducing its costs [Tr. 4/1/75, pp.29-31].

It was not meeting its obligations currently and had survived by deferring obligations to trade creditors, equipment and landlord lessors as well as its employees [Tr. 4/1/75, pp. 29-31, 47-8]. REA's gross payroll amounted to some $1,700,000 per week with wages representing 60% of REA's total weekly expenses [Tr. 4/1/75, pp. 31-5, 47]. Of the gross payroll, approximately $1,500,000 represented Union wages of which 95% was paid to BRAC members and the balance to IAM members.

In order to survive, REA was compelled to effect operational economies and reduce rates of pay. The former aspect was of significant importance and the collective bargaining agreements impeded REA's ability to streamline and reduce the cost of its operations. REA generated two alternate plans or programs designed to revise its operation and reduce its costs [Tr. 4/1/75, p. 57, Exhs. 7D, 7G, 4,5,6]. The plans, known as A and B-2 [Exhs. 4-7], were not immediately implemented because of provisions contained in the collective bargaining agreements [Tr. 4/1/75, p. 52]. Since Judge Wyatt's decision and the decision of this Court denying BRAC and IAM stays pending this appeal, plan B-2 has been substantially implemented.

REA's plan B-2 [Exhs. 4-7] contemplated the closing of 61 service centers and the consolidation of 53 service centers, the elimination of two regional accounting offices, and the reduction of service center facilities from 301 to 187 [Exh. 7D, Tr. 4/1/75, pp. 63-7]. The expectation is that the implementation of plan B-2 will restore the balance between REA's operating revenues and expenses [Exh. 7E, Tr. 4/1/75, pp. 68-72].

REA's plan A is [Exh. 6, 7G] an all air express plan which would completely eliminate surface operations by closing 297 service

centers and using 140 air terminals and 328 "third-party" locations [Tr. 4/1/75, p. 75, Exh. 7G]. The vehicle fleet would be dramatically reduced from 6,447 to 784 and the number of employees would be reduced to 1,800 [Tr. 4/1/75, pp. 75-7]. REA does not want to implement plan A because it believes it can operate profitably under a restructured program combining both surface and air and because plan A would eliminate the greater number of BRAC jobs. Both plans, in order to be profitable, require a reduction in existing payrolls. Neither plan takes into account one-time costs of implementation or the payment of existing debts [Tr. 77-8]. It is anticipated, however, that the plans would provide a basis on which a successful operation may be predicated.

In 1974, REA paid its employees approximately $101,000,000 in wages, $9,000,000 in vacation pay and $3,000,000 in holiday pay [Tr. 4/3/75, pp. 10-16]. Under the collective bargaining agreements, REA is required to pay supplementary unemployment benefits. Accrued vacation benefits total $11,000,000 [Tr. 4/3/75, pp. 12-15]. BRAC members who are laid off, would be entitled to 90 days of unemployment benefits depending upon the conditions of the layoff. They would be entitled to between $5.30 per day for a certain period and then $15 or $18 per day [Tr. 4/3/75, p. 16]. In 1974 these benefits cost REA almost $600,000 [Tr. 4/3/75, p. 17]. REA's agreement with BRAC required comparability increases which have not yet been implemented but if they are will increase REA's payroll costs even further.

Rule 12 of REA's agreement with BRAC governs REA's right to effect the transfers and consolidations inherent in either plan A or plan B-2 [Exhs. 8A, 8B]. Rule 12 involves delays up to at least 60 days, and it requires arbitration of any dispute respecting

a transfer or consolidation upon demand by the Union [Tr. 4/3/75, pp. 23-5]. BRAC cannot deny REA's right to change its operations but it may compel arbitration of the "manner of impelementing the contemplated change." Thus, under the collective bargaining agreement BRAC could have delayed the implementation of either plan A or plan B-2 for a considerable period of time and even compelled alterations in their essential elements. Moreover, under existing interpretations of Rule 12, transfers and consolidations involve substantial economic consequences [Tr. 4/3/75, pp. 21-25]. Employees laid off by such consolidations are entitled to supplementary unemployment benefits and those who elect to follow their work are entitled to free movement of household goods, free transportation, time off to relocate, and an allowance for such things as redecorating [Tr. 4/3/75, pp. 21-23].

Whereas REA's agreement with IAM is not as restrictive respecting transfers and consolidations as that with BRAC, the Union (IAM) has nevertheless challenged REA's right to effect reductions in force and to alter its methods of operations [Tr. 4/3/75, pp.25-6].

The implementation of plan B-2 involved changes in what are known as "over-the-road" runs [Tr. 4/3/75, pp. 27-8]. Such changes are governed by Rule 8 of the BRAC agreement [Exh. 8A] which requires consultations between REA and the Union before such changes may be effected [Tr. 4/3/75, pp. 26-28]. Here, again, the collective bargaining agreement provided a substantial obstacle to the rapid implementation by REA of plan B-2.

It is apparent that, in order to survive, REA was compelled to effect operational economies, reduced rates of pay and minimize the impact upon it of the fringe benefits the Union

contracts required if operations were changed and consolidated. REA had to change and consolidate its operations promptly. If it did not it could not survive. For these reasons, among others, the subject collective bargaining agreements with BRAC and with IAM were deemed to be burdensome and onerous to it within the meaning of Section 313(1) of the Bankruptcy Act and Rule 11-53 of the Rules of Bankruptcy Procedure.

Clearly, REA could not and cannot continue to incur substantial liabilities for unemployment and relocation benefits required by the agreement with BRAC and IAM; it must effect reductions in costs promptly and inexpensively. REA is unable to pay the wages presently required by the agreements and the cost-of-living, comparability and other benefits which would, in the future, be required by the agreements. If REA is permitted to complete implementation of its plan B-2 and to maintain its Union payroll at existing levels, it has a reasonable chance of obtaining needed financing, restoring profitability and effecting a plan of arrangement with its creditors. Most important, if REA fails, its employees will join the swelling roles of the unemployed. Thousands of jobs are at stake as well as the interests of REA's stockholders and creditors and the shipping public.

## Questions Presented

1. Whether Section 313(1) of the Bankruptcy Act contemplates the disaffirmance by a debtor in possession of onerous and burdensome collective bargaining agreements.

[Judge Galgay answered this question in the negative and Judge Wyatt in the affirmative].

2. Whether Section 77(n) of the Bankruptcy Act applies to REA and all other debtors who may be subject to the Railway Labor Act but are not railroads with the result that they are precluded from the benefits of Section 313(1) of the Bankruptcy Act.

[Judge Galgay never reached this question and Judge Wyatt answered it in the negative].

## Point I
## THE COLLECTIVE BARGAINING AGREEMENTS TO WHICH REA, AS DEBTOR, WAS A PARTY MAY PROPERLY BE REJECTED BY REA AS DEBTOR-IN-POSSESSION WITHIN THE PURVIEW OF SECTION 313(1) OF THE BANKRUPTCY ACT

While holding that REA's collective bargaining agreements were executory in nature and imposed unreasonable burdens on the debtor such that they threatened the viability of the Chapter XI proceedings, the Bankruptcy Court nevertheless denied relief on the grounds that Congress never intended that Section 313(1) of the Bankruptcy Act should apply to labor agreements involving debtors in possession. The District Court disagreed on the grounds that there was "nothing cited in legislative history to indicate that collective bargaining agreements cannot be rejected under Section 313(1)" of the Bankruptcy Act. Indeed, 8 Collier on Bankruptcy 199 (14th ed.) states:

> "There is no restriction on the type of executory contract that may be rejected." (footnote omitted)

Section 313(1) of the Bankruptcy Act [11 U.S.C. §713(1)] provides that the Bankruptcy Court may:

> "...permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts..."

Executory contracts for the purpose of Section 313(1) are not limited to leases of real property. American A & B Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119 (2nd Cir., 1960). Labor agreements have long been recognized as falling within the ambit of Section 313(1). Any doubt with respect to this matter was resolved by Judge Levet in In re Klaber Bros., Inc., 173 F. Supp. 83 (S.D.N.Y. 1959). Judge Levet specifically held that the statute

permitted no differentiation in the treatment of executory employment or collective bargaining contracts. In Klaber, as here, a debtor in possession sought to reject the executory portion of his collective bargaining agreement with the Union. The Union resisted, claiming that the National Labor Relations Board had preemptive or exclusive jurisdiction. Judge Levet rejected this argument on the grounds that:

> "...there is no intent to limit the application of the authority and power granted to the court in Title 11 Id. at p. 84 U.S.C.A. §713 to reject executory contracts."

Of similar import is Carpenters Local Union #2746 v. Turney Wood Products, Inc., 289 F. Supp. 143 (W.D. Ark. 1968). There, the trustee in bankruptcy moved to dismiss an action brought by a labor union to compel specific performance of a labor contract and to disaffirm the contract as executory. The union argued that the subject employer was engaged in an industry "affecting commerce" and, therefore, was subject to the National Labor Relations Act which precluded intervention by the Bankruptcy Court. This argument was rejected and the District Court held that during the life of a collective bargaining agreement it is an "executory contract" within the meaning of the Bankruptcy Act and subject to rejection as onerous and burdensome.

Particularly instructive is the decision of Bankruptcy Judge Babitt in Matter of Business Supplies Corporation of America, [73 B 70]. Relying upon Judge Levet's decision in Klaber, Judge Babitt invoked Bankruptcy Act §313(1) to disaffirm a collective bargaining agreement holding that:

> "The Bankruptcy Act in its treatment of debtors in arrangement under Chapter XI draws no

distinction between types of executory contracts, and it is thus clear that an unfulfilled collective bargaining agreement is no less an executory contract within the meaning of Section 313(1) of the Bankruptcy Act and remains susceptible of rejection...

"The record here abundantly demonstrated that rejection of its collective bargaining agreement was in the best interest of this debtor's efforts to come to an accord with its creditors and to emerge from this Court rehabilitated once more in the business world. It would be contrary to this overall purpose of Chapter XI to read into Section 313(1) an exception for collective bargaining agreements in the absence of a clear expression by Congress that certain classes of executory contracts were to be beyond the reach of this Court's power."

In Designers' Guild of Ladies' Apparel, Local 30, ILGWU v. Hers Apparel Industries, Inc.,[74 B 831], Bankruptcy Judge Babitt again rejected and disaffirmed as onerous and burdensome a collective bargaining agreement. On March 3, 1975, Judge Carter of the United States District Court for the Southern District of New York affirmed that decision. Citing Matter of Business Supplies Corporation of America, 72 L.C.¶13,940 (SDNY 1973), Judge Carter held, first, that collective bargaining agreements were unquestionably executory. Citing Klaber, and Turney Wood Products, Judge Carter held that collective bargaining agreements, as executory contracts, were subject to rejection under Section 313(1) of the Bankruptcy Act. Once again, he found unpersuasive the argument that the jurisdiction of the Bankruptcy Court was preempted by the National Labor Relations Act.

In the Designers' Guild case, Judge Carter specifically distinguished the decision of Judge Knapp in Shopmen's Local Union #455 v. Kevin Steel Products, Inc., 381 F. Supp. 336 (S.D.N.Y. 1974)*

*This case is now sub judice before this Court having been argued on June 11, 1975.

where a conflict was found between the National Labor Relations Act and the Bankruptcy Act and the former was held to prevail. As noted by Judge Carter, Judge Knapp, in Kevin Steel, was confronted with a situation wherein an unfair labor practice charge had been filed against the debtor with the NLRB several months before the filing of the Chapter XI petition and the administrative law judge had ruled that the debtor was guilty of unfair labor practices and had ordered it to perform the collective bargaining agreement. Judge Carter quite properly limited the Kevin Steel case to its particular facts, none of which are present here.

Like Judge Carter, Judge Wyatt in this case found that Judge Knapp's decision in Kevin Steel was "easily distinguishable on the facts." In any event Judge Wyatt refused to follow the rationale of Kevin Steel and chose instead to adopt Judge Levet's view in Klaber Bros.

In In re Mamie Conti Gowns, Inc., 12 F. Supp. 478, (S.D.N.Y. 1935), the Court dealt with a corporate reorganization arising under the Chandler Act (predecessor to the current Bankruptcy Act). There, too, the Court recognized its power and authority to set aside a collective bargaining agreement, but chose not to exercise such power on the ground that the subject corporation had not substantiated its claim that its labor expenses were out of proportion to the volume of business it enjoyed and that no feasible plan of reorganization providing for a fair prospect of profit could be put forward so long as the contract remained in force. A significant factor noted by the Court in

its decision was as follows:

> "Considering the disproportion of assets over liabilities as stated in the debtor's petition, I am not wholly satisfied that this entire proceeding under section 77B was begun to promulgate and consummate a plan of reorganization, and not to discard, by order of the court this particular contract." Id. at 480.

Rule 810 of the Rules of Bankruptcy Procedure applicable to Chapter XI proceedings pursuant to Rule 11-62 of the Rules of Bankruptcy Procedure states in pertient part:

> "The court shall accept the referee's findings of fact unless they are clearly erroneous..."

The Bankruptcy Court found as a matter of fact that the collective bargaining agreements in this case are onerous and burdensome to REA. There is no other interpretation which can be placed upon the lengthy statement of facts in the opinion of Bankruptcy Judge Galgay. They demonstrate, beyond peradventure, that REA cannot survive under its collective bargaining agreeements with BRAC and IAM. The agreements are too costly and they so restrict management's rights that essential consolidations of operations cannot be made in sufficient time to prevent economic disaster. If these facts don't meet the definition of "onerous and burdensome" no set facts ever will. Judge Wyatt so found and on this subject there can be no reasonable dispute. Whereas the BRAC and IAM agreements may differ somewhat, and whereas the latter may not be as restrictive as the former, it is beyond peradventure that both agreements were properly found onerous and burdensome. This factual determination is not clearly erroneous and appellants do not even so contend.

The gravamen of appellant's argument is that Section

313(1) of the Bankruptcy Act is inapplicable because REA is a "carrier" whether the meaning of the Railway Labor Act (45 U.S.C. §§ 151 et seq.) REA and, therefore, its collective bargaining agreements are somehow sacrosanct. REA readily concedes that it is a "carrier" and subject to the Railway Labor Act much the same as most interstate employers are subject to the National Labor Relations Act. There is no statutory prohibition against rejection of RLA agreements by debtors in possession or trustees in bankruptcy and there is no inherent conflict between the RLA and the Bankruptcy Act. REA, as debtor in possession, is a new juridical entity created by the Bankruptcy Act. As such, it is vested with different rights and obligations than those vested in REA, as debtor. REA, as debtor in possession, is a "new" employer subject to the RLA without the impediment of the collective bargaining agreement to which REA, as debtor, was a party. Of course, as debtor in possession, REA may affirm or adopt the contracts of its predecessor in interest but it need not do so. Here, it has chosen to exercise its statutory right to reject which leaves it nevertheless subject to the RLA but as a newly created employer which, if it seeks to utilize the same or a similar labor force, must negotiate with BRAC and IAM in accordance with the procedures set forth in the RLA.

In construing the Bankruptcy Act and the RLA this Court must seek to accomodate their respective policies and to so interpret them as to reconcile any apparent differences. Trainmen v. Chicago R. & I.R. Co., 353 U.S. 30, 39-42 (1956). It is submitted that the Bankruptcy Act and the RLA are capable of coexistence such that "absent and clearly expressed congressional

intention to the contrary" it is the duty of the Court "to regard each as effective." Regional Rail Reorganization Act Cases, 419 U.S.102, 133-4 (1974).

Moreover, the Bankruptcy Act was originally enacted in 1898 whereas the RLA was enacted in 1926. While Section 313(1) of the Bankruptcy Act first appears in the Chandler Act of 1938 it was not a new provision but simply declaratory of the inherent power which the Bankruptcy Court had under Sections 12 and 74 of the old Act. Section 313(1) was patterned after paragraph (1) of Section 116 of Chapter X which, in turn, was broadly derived from Clause (3) of subd. c of Section 77B. See,Weinstein, The Bankruptcy Law of 1938 (Chandler Act), NACM 1938 at p. 159. Thus, the principles of construction set forth in the Regional Rail Reorganization Act Cases, supra, apply and the "new statute will not be read as wholly or even partially amending [the] prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled..." 419 U.S. at 134 (citation omitted.)

As Judge Wyatt correctly noted, there is nothing in the legislative history of either statute which creates a 'positive repugnancy.' The most that can be said is that the RLA is ambiguous on the subject of the effect of Section 313(1) of the Bankruptcy Act on insolvent "carriers." Certainly repeals by implication are disfavored. See, e.g. Mercantile National Bank v. Langdeau, 371 U.S.555, 565 (1963); United States v. Borden Co., 308 U.S.188, 198-199 (1939).

The public policy expressed in the RLA and in the National Labor Relation Act is entitled to no greater weight than that afforded the policies underlying the Bankruptcy Act, the

Antitrust Laws, the Tucker Act or the Norris-LaGuardia Act. See, Bernstein v. Universal Pictures, ___ F.2d _____(2d Cir. 1975) [Docket No. 74-2169, decided 5/27/75]; Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local No. 100, ____ U.S. _____(1975) [43 L.W.4675]; Trainmen v. Chicago R. & I. R.Co., supra; Regional Rail Reorganization Act Cases, supra. If onerous and burdensome collective bargaining agreements cannot be rejected by trustees in bankruptcy and debtors in possession the basic policies of the Bankruptcy Act will be frustrated and companies like REA will never be able to reorganize successfully.

The policy underlying the RLA is set forth in Sections 1(a) and 2, First, of the statute[45 U.S.C.§151(a);152,First]which provide that the various provisions of the RLA respecting the "making and maintaining" of collective agreements are designed to avoid interruption to commerce or to the operations of carriers. Section 313(1) of the Bankruptcy Act does not in any way relate to the "making" or "maintaining" of agreements but, rather, to the rejection or disaffirmance of pre-existing agreements deemed onerous and burdensome and thus inimical to the Congressional policies of corporate reorganization or orderly dissolution of bankruptcy estates.

It is necessary to construe legislation in light of Congress' purpose. Williams v. United States Fidelity & Guarantee Company, 236 U.S., 549 (1915). While the legislative history of the 1938 revision to the Bankruptcy Act, popularly called the Chandler Act, says virtually nothing helpful about executory contracts, [S. Rep. No. 1916, 75th Cong., 3d Sess. 12

(1938)], it is clear that Section 313(1) was patterned after Section 116(1) of the Bankruptcy Act, [11 U.S.C.§516(1)] applicable in Chapter X proceedings, which, in its turn, is derived from the third clause of subdivision c of Section 77B involving the reorganization of railroads in interstate commerce. The express declaration of Section 313(1) in Chapter XI was thought advisable to "make clear and round out" the powers of the Court "particularly so since a like power has been expressly declared in Sec. 116 of Chapter X" [sic]. Weinstein, The Bankruptcy Law of 1938 (Chandler Act) NACM 1938. Whatever the problem in another context, this Court should have no difficulty in reconciling 45 U.S.C.§§151 et seq. and 11 U.S.C.§713(1). The former speak to the prevention of wasteful strikes and interruptions of interstate comerce [Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union, 396 U.S. 142, (1969); Elgin, J. & E.R.Co. v. Burley, 326 U.S.711 (1945)] while the latter speaks to the successful reorganization of corporate businesses in economic distress. Certainly, the two policies may be reconciled. To accept appellants' argument leads inevitably to the demise of REA and the defeat of both the manifest purpose of Section 313(1) and the implied purpose of the RLA. The demise of REA will leave nothing for appellants to bargain about and will irrevocably disrupt interstate commerce by eliminating REA as a factor in such commerce.

REA acknowledges that in order to obtain a labor force it might well have to deal with the same employees represented by these same appellants. This is true of virtually every debtor in a Chapter XI proceeding. In so doing, REA recognizes

its duty to comply with the RLA. Section 313(1) of the Bankruptcy Act does not speak to the consequences of rejection. It merely establishes standards to be applied for the Court to exercise its discretion in authorizing the rejection of executory contracts found to be onerous and burdensome. The RLA governs the consequences of the rejection of these collective agreements.

Bankruptcy Judge Galgay correctly noted at p.15 of his opinion that:

> "[The Court] has not been called on to weigh for the debtor or the unions the consequences which might flow from adjudication."

Nor, it is submitted, is this Court called upon to weigh for the debtor in possession the consequences which might flow to it from its failure to retain working forces upon rejection of its collective bargaining agreements.

It should be pointed out that an executory contract cannot be rejected in part. It is for this reason that REA must run the risks incident to seeking to reject its contracts with the appellants in their entirety. Such rejection does not relieve REA of its duty to pay wages and benefits which accrued prior to rejection and it does not relieve REA of its obligation to make every reasonable effort to reach new agreements with appellants which, in many material respects, may be the same as those rejected.

Collier states that the power to reject executory contracts should be exercised where rejection is to the advantage of the estate. If a contract is beneficial, the application for its rejection under Section 313(1) should be

denied. 8 Collier on Bankruptcy, 206 (14th Ed. 1975). He goes on to state:

> "But where the contract is detrimental, its rejection should be permitted....Since rejection of an executory contract makes a person injured thereby a creditor and gives him a provable claim for any damages suffered, the disadvantages of keeping a contract in force must be viewed in the light of the liability that may be created by its rejection." (Supra, pp. 206-207)

Here, the collective bargaining agreements are manifestly detrimental. REA cannot survive with them. It may survive without them. It would most certainly not have survived had the Court below not permitted their rejection and had this Court not denied appellants' motion for a stay pending appeal.

## POINT II

### SECTION 77(n) OF THE BANKRUPTCY ACT DOES NOT APPLY TO REA TO PRECLUDE REA FROM THE BENEFITS OF SECTION 313(1) OF THE BANKRUPTCY ACT

Appellants seek to invoke Judge Rayfiel's decision in Matter of Overseas National Airways, 238 F.Supp.359 (E.D.N.Y. 1965). There, while recognizing the power of the Bankruptcy Court to reject the executory portions of a collective bargaining agreement on a proper evidentiary showing, the District Court noted that Section 77(n) of the Bankruptcy Act might require the denial of relief to an air carrier on the grounds that its collective bargaining agreements with pilots and stewardesses were governed by the Railway Labor Act and could not be changed pursuant to the provisions of that statute. Section 77(n) of the Bankruptcy Act provides that:

> "No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in [the Railway Labor Act]..."

Judge Rayfiel, in Overseas National Airways, construed Section 77(n) as applying to any collective bargaining agreement covered by the RLA regardless of whether that agreement involves "railroad employees". To the extent Judge Rayfiel's decision stands for that proposition, it is submitted that it is erroneous. However, the discussion of Section 77(n) by Judge Rayfiel in the Overseas National Airways case is gratuitous since

Judge Rayfiel found that, in any event, the debtor had failed to demonstrate that the subject collective bargaining agreements were onerous and burdensome within the meaning of Section 313(1). Judge Rayfiel's "decision" on this point is pure dicta and flies in the face of the manifest Congressional intent.

Significantly, Bankruptcy Judge Babitt, in Business Supplies Corporation of America, supra, refused to accept Judge Rayfiel's interpretation of Section 77(n) on the grounds that it was "nothing more than an ipse dixit." Further, Judge Babitt held that the Overseas National Airways case "must be limited to its facts by the statute specifically involved for it is clear that the Court there determined want of power to reject under Section 313(1) of the Bankruptcy Act by reason of Section 77(n) of the Bankruptcy Act, 11 U.S.C. §205 involving reorganization of railroads engaged in interstate commerce." Judge Babitt quite correctly noted that Section 77(n) represents a particular Congressional solicitude for railway workers based on Congress' "concern for continued health of the interstate railway systems of this country."

It is clear beyond peradventure that the Railroad Reorganization sections of the Bankruptcy Act constitute and must be construed as an integrated whole. They were enacted by the Congress in 1933 to meet a particular need. The Congressional purpose is amply set forth in the report of the House of Repre-

sentatives (Report Number 1897, 72d Cong., 2d Sess.) as follows:

> "Railroads are at this time excluded from the operation of the bankruptcy law. The necessity for the enactment of this section grows out of the present expensive, protracted, confusing, and inefficient administration of affairs of railroad companies engaged in interstate commerce in equity receiverships. The necessity for its immediate enactment results from the fact that at the present time many of the railroad organizations of the country confront the necessity of reorganization. They have reached the limit of their ability to borrow from the Reconstruction Finance Corporation. They must either reorganize under some arrangement such as is provided for by this section, or be administered in equity receiverships. The protracted period of such administration, the duplication of expense incident to ancillary receiverships, the waste, the opportunity for manipulation on the part of special groups, are too well known to require comment."

The very same Congressional report makes only brief mention of what is now Section 77(n) of the Bankruptcy Act. It is defined as "regulating minor questions of procedure."

As originally enacted, what is now Section 77(n) provided as follows:

> "No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railroad Labor Act, or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1972, between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class I railroads."

Thus, it is clear that the Congress was specifically concerned with railroad reorganization and <u>not</u> with corporations entitled to the benefits of other provisions of the Bankruptcy Act. It is a matter of historical fact that REA was at one time an adjunct of the railroads. It is also a matter of fact that its labor relations are governed by what is now the

RLA. However, REA is not entitled to the benefits of railroad reorganization under Section 77 of the Bankruptcy Act and it is manifestly unreasonable to deny it the right afforded debtors under Section 313(1) while at the same time precluding it from reorganizaing as a railroad under Section 77.

There is no question whatsoever that REA is not a railroad, that its employees are not "railroad employees", and that it is not entitled to the benefits of the railroad reorganization provisions of the Bankruptcy Act. The Court's attention is directed to Senate Report Number 92-1158 [92d Cong., 2d Sess. 1972], the report of the Senate Committee on Commerce on federal assistance for carriers of express. There, the Senate Commerce Committee, in considering legislation to provide federal loan guarantee assistance for certain common carriers of express, including specifically REA, reported as follows:

> "It is necessary to distinguish the effects of REA bankruptcy and that of a railroad. While railroads which filed for bankruptcy come under the provisions of Section 77 of the Bankruptcy Act which in effect means that the railroad while in reorganization keeps operating, this section does not apply to REA. REA would come under the provisions of Chapter 10 of the Bankruptcy Act which does permit reorganization of the corporation and continued operation by the debtor, or the Bankruptcy Court could order liquidation. There is no way of knowing whether and certainly no guarantee that REA would be kept in operation if it entered bankruptcy.
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> * * * *
>
> "If REA should go into bankruptcy, the provisions of Section 77 of the Bankruptcy Act would not apply, since it is not a common carrier by railroad. If such a situation should develop, operations probably would continue to be conducted under the provisions of Chapter X of the Bankruptcy Act which permits reorganization of the corporation,

and continued operation by the debtor. A bankruptcy court, however, has the power to order liquidation."

The Congressional purpose in providing for railroad reorganization is clear. It is also clear that Section 77(n) of the Bankruptcy Act which is part and parcel of the railroad reorganization provisions of the statute applies only to railroads and not to express companies and other corporations which are not entitled to the benefits of railroad reorganization.

Accordingly, it is submitted that the District Court had jurisdiction to disaffirm the collective bargaining agreements between REA and its labor unions and that the appropriate principles are those set forth by Bankruptcy Judge Babitt in Matter of Business Supplies Corporation of America, supra, when he held that:

> "I am satisfied that In Re Klaber Brothers, Inc., supra, not only states the law of this District, binding on me, but is a correct holding which effectuates Congress' purpose in Chapter XI of rehabilitating debtors whose financial situation is precarious without requiring some debtors to adhere to unecessary and burdensome contracts. Judge Levet's ruling is also reconcilable with the Labor Management Relations Act, 29 U.S.C. §§ 141 et seq., which has its own purposes expressed in Section 1, 29 U.S.C. §141. These purposes are not deflected by my giving effect to Section 313(1) of the Bankruptcy Act designed to salvage financially pressed businesses. This is not to say that the Court is not mindful of the important role that organized labor plays in the commercial world. But, rejection of this collective bargaining agreement did not leave the union bereft of all rights for it certainly has the right to file an appropriate claim based on the rejection. See Section 355 of the Act, as amended in 1967, 11 U.S.C. (1970 Ed.) §755a, and cf. In re Miracle Mart, 396 F.2d 57 (2nd Cir., 1968)."

Professor Vern Countryman of the Harvard Law School wrote a lengthy article, in two parts, entitled Executory

Contracts in Bankruptcy in Volumes 57 and 58 of the Minnesota Law Review, January 1973 and March 1974. He acknowledges, as does REA, that "even if the Collective Bargaining Agreement is not assumed, the trustee-receiver or debtor-in-possession is under an obligation to bargain with the Union representatives of the employees and to refrain from forbidden unfair Labor practices." 58 Minnesota Law Review 493 In his discussion of the Overseas case, supra, he points out that the Court there spoke to the issue of leaving the employees without compensation for their losses while the debtor might, at the expense of the employees, be able to consummate a more favorable plan of arrangement with its other creditors. Id. at 497-99.

In the instant matter there is no question but that a favorable plan of arrangement may not be consummated at all if the contracts are not rejected. REA is exerting all its efforts to prevent prejudicing its employees' rights any more severely than its creditors are being temporarily prejudiced. In his discussion, Professor Countryman makes an important point with regard to the need for considering collective bargaining agreements as rejectable pursuant to Section 313(1) of the Bankruptcy Act. His point reinforces the argument made herein by REA that if labor legislation or railroad legislation is considered paramount to the Bankruptcy Act, the purposes of the Bankruptcy Act are frustrated and rendered nugatory. He says:

> "It is doubtful that the Penn Central reorganization will continue long enough to enable the trustees to resolve the train crew dispute with the Unions. It is even more doubtful that a Chapter X or XI proceeding can remain viable for the period required to exhaust the pro-

> cedures of the [Railway Labor Act]. Hence, the operations of that Act seems effectively to preclude the resolution of most Labor disputes in a bankruptcy rehabilitation proceeding for a railway or an airline. Moreover, the [Railway Labor Act] seems also to preclude any interim relief from the onerous Collective Bargaining Contract of a railroad or an airline in bankruptcy proceedings. Where the trustee, receiver or debtor-in-possession does not exercise the option to assume or reject such a contract, the Act forestalls the negotiation of a new and less onerous contract to apply while the proceedings are pending." (emphasis added) Id. at 498.

Professor Countryman recognizes that a debtor in possession such as REA does have the option to reject a collective bargaining agreement and, further, he recognizes that, absent Court permission when the option is exercised, a rehabilitation of a debtor may be impossible.

REA is the only express company not engaged in operations similar to those of railroads or airlines which, for historical reasons, has agreements with its employees pursuant to the Railway Labor Act. Since it cannot gain relief pursuant to Section 77 of the Bankruptcy Act it ought not to be bound to other provisions of that section. In this sense, this case is unique, one of first impression, and if REA's relief is not granted, the demise of the historical services rendered by REA may well be imminent.

## CONCLUSION

The decision below should be affirmed as a matter of law.

Respectfully submitted,

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Jane S. Solomon, being duly sworn, deposes and says:

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Sworn to before me
this 23RD day of June, 1975.

Steven M Pesner
Notary Public

STEVEN M. PESNER
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No. 31-4506881
Qualified in New York County
Commission Expires March 30, 1977